NO. 21645-A

United States
Court of Appeals
for the Ninth Circuit

MICHAEL PASTERCHIK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Appellee accepts Appellant's jurisdictional statement.

STATUTES AND RULES INVOLVED

18 U.S.C.A. §2312. Transportation of Stolen Vehicles:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

28 U.S.C.A. §2111. Harmless error:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Criminal Procedure, Rule 52(a). Harmless Error:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

COUNTER-STATEMENT OF THE CASE

On June 4, 1966, Agent Max Taylor of the Federal Bureau of Investigation received a telephone call from Phillip Atteberry, a bartender at the Portland Motor Inn, informing that a 1966 Thunderbird driven by a Dr. Michael Pasterchik might be a stolen vehicle (Tr.[1] 60, 61, 132, 138). Atteberry had observed that Michigan license plates, which were initially on the Thunderbird, had been replaced by Illinois plates during Pasterchik's stay at the Portland Motor Inn (Tr. 131-132, 134). He supplied the numbers of both sets of plates to Agent Taylor, but he had inadvertently transposed the numbers of the Illinois plates (Tr. 136).

Later that day Agent Taylor determined that the Federal Bureau of Investigation office in Denver had a file on Michael Pasterchik (Tr. 138). He also sent teletype messages to Denver, Detroit, and Springfield, Illinois, requesting information (Tr. 138, 139). On this same date, June 4, Agent Taylor received a reply teletype from the Detroit office of the Federal Bureau of Investigation, advising that the Michigan license plate reported by Atteberry was a dealer's plate which had been stolen from a Chrysler-Plymouth agency

[1] As used hereafter, Tr. denotes the transcript of the proceedings below and R., the Record on Appeal.

(Tr. 136, 141, 144, 145). There was no report that a 1966 Thunderbird had been stolen (Tr. 145).

On this same date, Agent Taylor received a reply teletype from Denver informing that Pasterchik had been recently released from the United States Penitentiary at Leavenworth, Kansas, and that he was currently under investigation (Tr. 142). Again on June 4, Agent Taylor received a reply teletype from Springfield, Illinois, advising that the Illinois license plates reported by Atteberry had been issued to a vehicle other than the 1966 Thunderbird and that there had been no theft report concerning them (Tr. 143). From this information, Agent Taylor determined that the Illinois license number supplied by Atteberry was incorrect (Tr. 136, 151).

On June 5, Agent Taylor sent a second teletype to Denver, Detroit, and Springfield requesting additional information (Tr. 144). On June 6, a teletype was received from Denver, advising that Pasterchik was involved in a theft at Phoenix, Arizona, of a 1966 Mustang, which was left at Denver (Tr. 146). The Portland Federal Bureau of Investigation office was further advised that the Phoenix Police Department had a grand theft auto and embezzlement warrant for Pasterchik in connection with the Mustang (Tr. 146). The Phoenix Police Department was informed by phone that Pasterchik was in the Portland area, and

an unlawful flight process was issued in the District of Arizona (Tr. 146).

At 3:00 P.M., on June 6, after receipt of the above information, Special Agents Taylor and Ralph Himmelsbach, accompanied by Lake Oswego Police Chief Lyle Perkins, arrived at the Lake Oswego residence of Iris Dorsey Fortney, where Pasterchik had been staying for approximately a month (Tr. 18, 64, 86, 100). The agents noticed a Thunderbird in the garage similar to that described by Atteberry (Tr. 24, 75). The car had no license plate on the front (Tr. 59). The agents knocked at the front door, and through a window they observed Pasterchik sitting at a table with Mrs. Fortney and her daughter (Tr. 19, 64).

After Pasterchik opened the door, the agents identified themselves and arrested Pasterchik for unlawful flight to avoid prosecution. He was standing in the doorway at that time (Tr. 19, 64). Pasterchik told the agents he wanted to get dressed, as he was not wearing a shirt or shoes, and he asked the agents not to reveal their identity to Mrs. Fortney (Tr. 19-20, 64). The agents accompanied Pasterchik inside the house to a bedroom on the main floor, where he dressed under their observation (Tr. 20, 64). Pasterchik attempted to leave his billfold on the dresser, but he was told to bring it with him (Tr. 20, 64-65). The agents then left the Fortney residence. They did not tell Mrs.

Fortney at that time that they had arrested Pasterchik (Tr. 20, 65).

Pasterchik was handcuffed in the FBI car and was advised of his rights according to the *Miranda* decision (Tr. 66). Pasterchik acknowledged that he understood his rights, and he did not give any statements to the arresting officers (Tr. 66). He was immediately taken to the United States Courthouse and there arraigned on the charge of unlawful flight to avoid prosecution by Chief Judge Gus J. Solomon, acting as United States Commissioner (Tr. 21, 67). Pasterchik was then placed in the custody of the Marshal, and the contents of his billfold were examined and itemized at the Marshal's Office (Tr. 22, 67). A check for $200, signed by Pasterchik, and a Selective Service card in the name of Dr. Michael Pasterchik were taken from the wallet (Tr. 23, 114). The billfold and the rest of its contents were returned to the Marshal (Tr. 23, 68).

At 5:00 P.M., a telephone call was received from Atteberry, who was at Mrs. Fortney's house and who also was a mutual friend of Mrs. Fortney and Pasterchik (Tr. 24, 91). Agents Taylor and Himmelsbach returned to the Fortney residence at 7:00 P.M. (Tr. 24, 76-77, 261). Mrs. Fortney signed a consent to search form after she was advised of her constitutional rights (Tr. 25-26, 69, 91-92, Government's Exhibit No. 30).

The agents searched the bedroom of Mrs. Fortney's daughter, where Pasterchik kept his clothes (Tr. 26, 69-70, 88, 93). On top of the bedroom dresser, in plain sight, were a number of cards and papers (Tr. 27, 71). These were taken and Mrs. Fortney was given a receipt for them (Tr. 95). Included in these items were a purchase order for Dr. Joseph Roach, Livonia, Michigan, for a 1966 Thunderbird, license number 368D19; a Shell Oil Company credit card in the name of Cregar Pickwick; a Michigan license registration for a 1966 Thunderbird, number 368D19, assigned to Dr. Joseph Roach, Livonia, Michigan; and five blank Michigan license registration cards (Tr. 29-31). It has previously been determined that Michigan license number 368D19 had been stolen from a Michigan Chrysler-Plymouth dealer. These items were the subject of a motion to suppress, which was denied (R. 21, Tr. 29-31, *United States v. Pasterchik,* 267 F. Supp. 44 (D.C. Oregon, 1966)). They were later received in evidence during Pasterchik's trial (Tr. iii, 272).

The attic where Pasterchik slept was also searched, but nothing was taken (Tr. 31, 72, 87, 95). The agents then went to the garage, where Mrs. Fortney identified the parked Thunderbird as belonging to Pasterchik (Tr. 55-56). She stated she had limited permission to drive the car (Tr. 88). Mrs. Fortney then opened the trunk with a key from a set she had taken off the dresser in her daughter's bedroom (Tr. 32, 72). She had

used these keys before to drive the car under Pasterchik's permission (Tr. 96).

In the trunk the agents found an Illinois license plate, number HC-7728, and a Michigan license plate, number 368D19 (Tr. 33). The two plates were seized, and Mrs. Fortney was given a receipt for them (Tr. 73). The Michigan plate was later received in evidence during Pasterchik's trial (Tr. 264).

On June 10, Pasterchik's wallet was seized under authority of a search warrant by Agent Taylor at the Multnomah County Jail, where Pasterchik was incarcerated (R., Tr. 114, 115). The wallet and its contents were received for the purpose of a hearing regarding the defendant's motion to suppress (Tr. iii, 114). However, neither the wallet nor any of its contents were received in evidence during Pasterchik's trial (Tr. iii). The various identification cards received in evidence during the trial came from the top of the dresser in the bedroom of Mrs. Fortney's daughter, and were included in Government Exhibit Numbers 4-23 (Tr. iii, 29-31).

Pasterchik was subsequently indicted by the Federal Grand Jury on June 13, 1966, for the interstate transportation of a stolen motor vehicle (R.1). The 1966 Thunderbird in Pasterchik's possession was owned by the Hertz Corp.; had been rented by an individual using the name of Cregar Pickwick on April 7,

1966, at Chicago, Illinois, to be returned to Hertz on April 8, 1966 (Tr. 163, 164). No permission was given to take the car out of the state (Tr. 177). Among Pasterchik's effects introduced into evidence was a Shell credit card issued to Cregar Pickwick (Tr. 188), and numerous Shell credit card invoices signed Cregar Pickwick were introduced showing purchases of gas by one Cregar Pickwick from Illinois to Oregon (Tr. 273). Cregar Pickwick is a firm name not belonging to any particular individual, and Appellant had not been authorized to use the credit card (Tr. 186, 187). After a trial by jury, Pasterchik was found guilty as charged on November 9, 1966 (R. 25). He was sentenced to five years on November 30, 1966.

ARGUMENT

I

SEARCH AND SEIZURE OF CERTAIN OF APPELLANT'S PERSONAL EFFECTS IN THE FORTNEY HOUSEHOLD WAS PROPER PURSUANT TO MRS. FORTNEY'S CONSENT TO SEARCH HER HOUSE.

Appellant complains of the search of his effects in Mrs. Fortney's house pursuant to her written consent. Appellant was a non-paying guest in her house, and his effects were in a room occupied by her infant daughter and sporadically by a Mrs. Haney, a friend of Mrs. Fortney. Appellant slept in the attic. The items

complained of were in plain sight on the top of a dresser in this room (Tr. 27, 71). Appellant concedes there is some authority upholding the propriety of such a search and cites *Woodard v. U.S.*, 254 F.2d 312, U.S.D.C. D.C. (1958), and *Calhoun v. U.S.*, 172 F.2d 457, (C.A. 5, 1949). See also *Maxwell v. Stephens*, 348 F.2d 325, (C.A. 8, 1965). He cites no authority in support of his position. It is submitted that under the facts of this case the search was proper.

II

THE SEARCH OF APPELLANT'S WALLET WAS INCIDENT TO HIS ARREST.

As stated above, Appellant was arrested in Mrs. Fortney's house; taken to the Federal Courthouse; immediately arraigned before a District Judge acting as a commissioner; and then taken to the Marshal's Office where his billfold was searched. This whole process took between thirty and forty-five minutes (Tr. 21). Under the circumstances, the search was made within a reasonable time of his arrest. *Baskerville v. U.S.*, 227 F.2d 454 (C.A. 10, 1955); *Charles v. U.S.*, 278 F.2d 386 (CA 9, 1960). In any event, none of the items from the billfold were introduced into evidence at trial (Tr. iii), and, consequently, there could have been no prejudice. The point is therefore moot.

III

APPELLANT'S ARREST WAS BASED ON PROBABLE CAUSE.

The question as regards probable cause to arrest appellant on the Unlawful Flight charge has been dealt with extensively by the trial judge in *U.S. v. Pasterchik,* 267 F. Supp. 44 (1966). Prior to arresting appellant, the FBI had been advised by their Phoenix office that a grand theft and embezzlement warrant had been issued for appellant by the local Phoenix authorities, and also a Federal unlawful flight warrant based on these charges (Tr. 146). They had previously been advised where he was staying and what kind of car he was driving. After the agents had knocked on the front door of the Fortney residence, Appellant opened it and admitted having the same name as the person named in the warrant (Tr. 19). In addition, the agents saw a car in the carport which answered the description of the car which they had been previously advised Appellant was driving. It is difficult to see lack of probable cause under the above facts. Appellant claims he requested a hearing re probable cause at the initial proceeding (presumably the arraignment before the District Judge acting as Commissioner) on the day of his arrest. There appears to be nothing in the record regarding this, but Appellant in effect had this hearing during his motion to suppress (Tr. 1-157), and the Court found properly that probable cause existed.

IV-A

SEARCH OF APPELLANT'S AUTOMOBILE WAS BASED ON PROBABLE CAUSE AND THEREFORE REASONABLE UNDER THE CIRCUMSTANCES.

The whole background of facts prior to appellant's arrest and the search of the vehicle pointed to the stolen status of the car. The car had used different sets of plates from different states, one of which was stolen. A grand theft auto charge was outstanding against Appellant in Arizona. Subsequent to his arrest and prior to the search of the vehicle, a purchase order for the vehicle was found on the dresser in Mrs. Fortney's home using the stolen Michigan license number (Government's Ex. 9), together with a Michigan Registration for license number 368D19 (Government's Ex. 18), the number reported stolen, issued to another individual. In addition, Mrs. Fortney, who had permission to use the vehicle, provided the keys and opened the trunk (Tr. 32, 76, 92). Certainly, under these circumstances, the agents had probable cause to believe the car to be stolen, and under all the circumstances the search without a warrant was justified; if indeed this be such, considering Mrs. Fortney's involvement.

It is realized that *Preston v. U.S.*, 376 U.S. 364, and this Court's opinion in *Cotton v. U.S.*, 371 F.2d. 385 (1967), may appear to differ. However, as pointed out in *Preston*, there is a common sense difference be-

tween a house and a car as regards necessity for a search warrant, and the test is always "was the search reasonable" (Pg. 366). And in *Cooper v. California,* 386 U.S. 58 (1967), after distinguishing Preston, the Court said at page 62:

> "It is no answer to say that the police could have obtained a search warrant, for 'the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable'."

In *Cotton,* this Court pointed out at page 391:

> "We do not intimate that the police may not, if they have probable cause, take a stolen car from the thief and return it to its owner."

It might be argued if they have the right to take it and return it to its owner, they have the right to search without a warrant, at least under the facts set out above.

IV-B.

IF DEEMED TO BE UNREASONABLE, THE ONLY EVIDENCE GAINED THEREBY AND INTRODUCED INTO EVIDENCE WAS NON-PREJUDICIAL AND CUMULATIVE ONLY, AND ANY ERROR THEREFORE HARMLESS.

The only evidence incident to the search of the car introduced against Appellant at trial was the Michigan license plate (Government's Exhibit 24). This Court has already held in *Cotton* that it is proper, without a

warrant, to check a vehicle's identification numbers. It is submitted that the license plate is merely cumulative when considered with Government's Exhibit 50 (Appellant's motel registration slip containing notation of stolen license number), Government's Exhibit 9 (bill of sale with notation of number), and Government's Exhibit 18 (Michigan registration for that number). Also the fact that this Michigan license number had been reported stolen was brought out by Appellant in his cross-examination of Special Agent Taylor (Tr. 260, 261), not during the Government's direct examination. Therefore, if there was error in admitting the license plate, it was cumulative only, and harmless beyond all reasonable doubt. *Chapman v. California,* 386 U.S. 18, 22, 24 (1967), applying 28 U.S.C. §2111 and F.R.C.P. 52(a). See also *Granza v. U.S.* 377 F.2d 746, 749 (C.A. 5, 1967), and *Ware v. U.S.* 376 F.2d 717, 719 (C.A. 7, 1967), applying the rule set forth in *Chapman.*

CONCLUSION

It is respectfully submitted appellant's conviction should be affirmed.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: .....27th..... day of October, 1967.

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